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In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 21

ARO MANUFACTURING CO., INC., ET AL.,

PETITIONERS,

v.

CONVERTIBLE TOP REPLACEMENT CO., INC.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. ALL THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THIS COURT IN REVIEWING THE JUDGMENT OF THE COURT BELOW.

Respondent contends that some issues set forth in the questions presented were discussed so obscurely or not at all before the court below that these issues are not now properly before the Court (Resp. Br. 71-72, 77).[1] But this Court has "appellate Jurisdiction, both as to Law and

[1] We shall refer to the Brief for Respondent and Brief for Petitioners herein as Resp. Br. and Pet. Br., respectively.

Fact . . ." U.S. Const. art. III, § 2. That is, this Court reviews judgments, not opinions or briefs. Brown, *Process of Law*, 72 Harv. L. Rev. 77, 80 (1958). The Court unanimously rejected respondent's contention in *Muncie Gear Works, Inc.* v. *Outboard, Marine, & Mfg. Co.*, 315 U.S. 759, 765-68 where Mr. Justice Jackson said:

> We are not foreclosed from a decision under § 4886 on the point by the obscurity of its presentation in the courts below. This issue has been fully presented to this Court by the petition for a writ of certiorari, and in subsequent briefs and argument; and there is not the slightest indication that respondents have been prejudiced by such obscurity. To sustain the claims in question upon the established and admitted facts would require a plain disregard of the public interest sought to be safeguarded by the patent statutes, and so frequently present but so seldom adequately represented in patent litigation. *Id.* at 768.

II. The Top Fabric Could Have Been Claimed If It Were An Invention Which The Patentee Wished To Monopolize.

Respondent contends that it is unnecessary to separately claim the top fabric in order to obtain a limited monopoly in top fabrics used in the patented combination. Stated in a light most favorable to respondent, its reasons for asserting that the fabric need not be claimed can be summarized as follows. Although the claims in suit cover a combination, the fabric is the single component which characterized the invention (Resp. Br. 16-17). The

> . . . lower metal body structure or tonneau having a body panel, a folding bow structure supported by the

> tonneau . . . and a wiping arm provided with a punched out wiping boss attached to a part of the bow structure and guided at its other end . . . (R. 595)

are background elements (Resp. Br. 15-16). The top fabric could not have been separately claimed because of limitations in the English language and Patent Office restrictions (Resp. Br. 22).

But the patent claims use the English language to describe the top fabric as

> flexible top material . . . the top material at the rear quarter extending down . . . (R. 595).

It is true that the Patent Office would have never allowed a claim to the top fabric alone using these or any other words, but that's because the top fabric is not an invention, and Mackie and Duluk never claimed it was. Mackie and Duluk claimed as their invention a combination of old elements whose operative relationship was set forth as

> flexible top material supported by the bows and having the top material at the rear quarter extending down and secured to said panel on the inside and below the top of the metal body or tonneau, said top material spreading and adjoining the top of the side of the tonneau when the bow structure is raised, and a wiping arm . . . attached to a part of the bow structure and guided at its other end to cause it to wipe the top material in raising the top and seal the joint between the top material and the top of the tonneau (R. 595).

All the claim language quoted above is from Claim 9, the broadest claim in the Mackie-Duluk patent.

If we accept respondent's reasons for the top fabric not being separately claimed, its position as to the applicability of section 271(c) can be stated most favorably to it as follows. Since the combination is an invention and the top fabric is the most important single element of that combination, it is a material part of the invention within the meaning of section 271(c) (Resp. Br. 16-17). Although top fabrics of similar shape and almost identical dimensions fit both Ford Motor Co. cars which incorporate the patented combination as original equipment and Chrysler Corporation cars which do not have the patented combination as original equipment (R. 226-27), those fabrics intended for use in Ford Motor Co. cars are not suitable for substantial noninfringing use within the meaning of the exclusionary clause of paragraph (c) because a replacement fabric for one model car will not fit another model (Resp. Br. 27) due to differences in the size and shape of the body shells (R. 193-94).

But this construction proposed by respondent is inconsistent with the basic holding in *Mercoid* and *Carbice* that the grant of a patent on a combination does not authorize the patent owner to restrain competition in a single unpatented element of the combination sold for original use therein, even if the unpatented element has no other actual commercial use. And the holding in these cases was codified by the enactment of the contributory infringement provisions of section 271.

When the Patent Act came up for a vote in the Senate, the following colloquy between Senator Saltonstall and Senator McCarran, the Chairman of the Judiciary Committee which unanimously reported the bill favorably, shows that the Act codified existing patent laws.

> Mr. SALTONSTALL: I am not a patent lawyer, but I know patents are a very technical subject. Does the

bill change the law *in any way* or only codify the present patent laws? (Emphasis added).

Mr. McCarran: It codifies the present patent laws. 98 Cong. Rec. 9323 (1952).

Senator McCarran then obtained consent to have a prepared statement printed into the record without reading that statement to the assembled senators. The Senate then immediately passed the bill without having been able to read the statement. The statement said that some changes had been made in the law of patents without specifying the changes. *Ibid.*

But there is no question that the senators who were assembled on July 4, 1952 and voted to pass the bill understood from Senator McCarran's spoken statement that the Patent Act of 1952 was a codification of the then existing patent laws. We believe that in addition to codifying the holdings in *Mercoid* and *Carbice*, the contributory infringement provisions of section 271 codify the holding in *Amalgamated* (Pet. Br. 41-44) and *Wallace* v. *Holmes*, 29 Fed. Cas. 74 (No. 17,000) (D. Conn. 1871).

Wallace v. *Holmes* exemplifies the narrow definition of contributory infringement codified in the statute. There the claim covering the lamp read:

> I claim the improved lamp, as not only constructed with its cone or deflector, F, and its chimney rest, D, and chimney arranged with respect to each other as described, but as having the said deflector provided with peripheral springs, or the same, or the slits h, h, and the rest, D, made concavo-convex, and provided with an annular groove or lip at the bottom, for supporting the chimney, the whole being substantially as described or represented. 29 Fed. Cas. at 79.

The defendant made and sold every claimed feature of the invention except the chimney, knowing that the numerous individual purchasers would add the chimney and thereby directly infringe the patent. The court said:

> It was claimed, in behalf of complainant, that the chimney is no material part of the invention, and, therefore, that the defendants have made and sold all that is material to the patent. *Ibid.*

The court held that selling this material part of the invention[2] with the knowledge that the purchaser would add the immaterial background element, the chimney, to form the patented combination, was a virtual infringement. Since both Senate and House reports refer to contributory infringement as being a part of our laws for over 80 years, S. Rep. No. 1979 at 9, H. Rep. No. 1923 at 3, 82d Cong., 2d Sess. (1952), this 1871 case, the first case on contributory infringement, would seem to exemplify the narrow area where contributory infringement could properly be applied as understood by Congress.

Like the top fabric fragmentarily illustrated in the Mackie-Duluk patent (R. 589), the chimney was only fragmentarily illustrated in the *Wallace* v. *Holmes* patent. 29 Fed. Cas. at 75. Judge Rich recognized that using the patent on the lamp to control the sale of the unpatented chimney was misuse. *1949 Hearings* at 6. And we see no logical reason for allowing respondent and its assignor to restrain competition in the sale of the unpatented fragmentarily illustrated top fabric.

In support of its asserted right to a limited monopoly in unpatented top fabrics, respondent relies upon *Leeds &*

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[2] The words "material part of the invention" were the very words added by Congress to restrict the scope of the original provisions on contributory infringement (Pet. Br. 38-46).

Catlin Co. v. *Victor Talking Mach. Co. (No. 2)*, 213 U.S. 325 (1909) (Resp. Br. 5, 9, 24, 31, 36, 46, 65, 66). This case held that the owner of a combination patent covering a phonograph with the record as one element of the patented combination, could prevent the sale of unpatented phonograph records to be used in the patented phonograph. But the Court expressly disapproved this holding as inconsistent with the views expressed in *Mercoid*. 320 U.S. at 668. Moreover, had *Leeds & Catlin (No. 2)* been decided after the enactment of the Clayton Act, we think the Court would have reached an opposite result because the patentee was violating section 3 by conditioning an implied license to use the patented phonograph combination on the purchase of unpatented phonograph records from a source designated by the patentee. *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917) (by implication).[3]

Respondent argues that section 271 restored *Leeds & Catlin (No. 2)* (Resp. Br. 65). The best evidence cited in support of this proposition is testimony in the *1949 Hearings* of Mr. Stedman of the Department of Justice, pointing out the pitfalls in the original provisions on contributory infringement which went twice unreported (Pet. Br. 38-39). And the response by Congress to the criticism of Mr. Stedman and others was the enactment of a much more restricted provision on contributory infringement (Pet. Br. 38-48).

[3] We could distinguish the case at bar from *Leeds & Catlin (No. 2)* by pointing out that phonograph records were purchased in addition to the original record whereas the top fabrics sold by petitioners replace worn fabrics which are discarded. In addition, the phonograph record itself was an invention, though unpatented, whereas the top fabric is not. However, we prefer to rely on the basic unsoundness of *Leeds & Catlin (No. 2)* recognized by this Court in *Mercoid*.

III. The Scope of the Contributory Infringement Provisions is Important for Deciding Petitioners' Right To Declaratory Relief.

We counterclaimed for a declaratory judgment that petitioners did not contributorily infringe the Mackie-Dulux patent (R. 11-12). If petitioners are to receive the complete relief authorized by Fed. R. Civ. P. 54(c), there ought to be a declaration that they are free to sell unpatented top fabrics for original or replacement use without any restraints whatsoever. This holding would make it unnecessary to decide whether replacing worn fabrics was an infringement. It would also reassure the public that combination patent claims define the limits between infringing and noninfringing conduct. Moreover, combination patentees would be reminded again to separately claim novel elements of their combinations which they wished to monopolize.

On the other hand, a contrary holding would place a heavy burden on sellers of unpatented parts. For they would be bound to ascertain whether the combination in which the part is designed to fit is patented by a third party. And combination patentees would be given additional parties to sue in forums where the direct infringer might not be amenable to suit under the special patent venue provision. 28 U.S.C. § 1400(b) (1948). We believe that the contribution of a combination patentee to the progress of the useful arts is not sufficient to justify this encroachment on the rights of parts sellers and the public to a market for unpatented parts free from restraints.

Mr. Justice Hughes said, "Review by the Supreme Court is . . . in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants." S. Rep. No. 711, 75th Cong., 1st Sess. 39 (1937). And the greatest interest of the law is to guide the conduct of the public in its daily life so that litigation will be avoided.

Uncertainty as to the bounds of patent claims can only lead to efforts by combination patentees to expand the scope of their monopolies, and those against whom expanded rights are asserted must accept the expansion or face an expensive uncertain law suit.

IV. The Cases On Reconstruction Relied Upon By Respondent Permit the Patentee To Restrain Competition In the Patented Entity.

The policy of the patent laws in rewarding the patentee for an inventive contribution is carried out when he receives the profit or royalty derived from the initial sale. If someone reconditions the patented article after its useful life is exhausted or increases the functional capacity of the patented article without the permission of the patentee, that someone is depriving the patentee of the reward from the initial sale of a patented article. But the patentee's right to exclude extends only to the patented entity. And the patentees in the cases holding infringement relied upon by respondent (Resp. Br. 46-61), excepting *Leeds & Catlin (No. 2)* discussed above and another case discussed below, were only restraining competition in structures covered by their patents.

For example, in *Davis Elec. Works* v. *Edison Elec. Light Co.*, 60 Fed. 276 (1st Cir. 1894) (Resp. Br. 47-49), the patent covered a light bulb comprising carbon filaments in an evacuated glass bulb with conductors passing through the glass for delivering electric current to the filaments. When a light bulb burns out, the average person throws it away and buys a new one. But the infringer collected the burned-out patented light bulbs, removed the carbon filaments and the attached conductors, put new filaments and conductors in the old glass bulb, and evacuated and resealed the bulb to make a new light bulb, reusing only

the glass envelope. Since the infringer deprived the patentee of the profit or royalty associated with the sale of a new patented light bulb, infringement was properly found.

In *Morrin* v. *Robert White Eng'ring Works*, 143 Fed. 519 (2d Cir. 1905) (Resp. Br. 49), the patent for a boiler covered a combination of a group of like patentable but unpatented steam generating tubes in a supporting cylinder which the court regarded as a background element. The defendant sold only the tubes. The court held that "furnishing practically new sets of tubes . . . was, in fact, furnishing a new boiler essentially reconstructed in all of its novel features. This was infringement." *Ibid.* But the court also held that replacing a single burned-out patentable but not separately patented tube was not an infringement. *Id.* at 520. Since the patentee in this 1905 case was trying to restrain competition in the sale of the unpatented tubes sold singly, it would seem as if the patentee could not today enforce his claim for what might now be legitimately contributory infringement against sellers of new sets of tubes until he purged himself of his misuse in restraining the sale of single tubes. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488, 493 (1942).

V. Respondent and Its Assignor Misused the Patent In Violation of the Antitrust Laws.

Respondent emphatically states:

> There is no suggestion in the record that the sale of even a single top was diverted to or from Aro, or to or from anyone else, by reason of any conduct whatsoever of either respondent or anyone else. (Resp. Br. 70).

But William D. Hall admitted writing a letter to the

Howard Zink Corporation (Dep. of William D. Hall, p. 32, Tr. 880-84) and identified a photostat of that letter attached to the defendants' request for admission 58 and referred to as Defendants' Exhibit 25. The letter dated August 28, 1956 stated:

> Your replacement tops for [specified] convertible automobiles . . . Ford, Mercury and Lincoln models for 1952 through 1954 . . . infringe the said Ackermans patent.
>
> Your replacement tops for Ford and Mercury models for 1952 through 1954, and Lincoln models from 1952 to 1955 infringe the said Mackie-Duluk patent.
>
> General Motors Corp., Ford Motor Co. and Atlas International Co. have purchased licenses from our client [Automobile Body] and pay us a royalty on each replacement top that they sell for one of the above-mentioned cars.
>
> Instead of settling for past infringement and otherwise working out detailed negotiations for replacement for the aforesaid cars, some manufacturers are finding it convenient to purchase their tops, within the above categories, from Atlas International Co. We understand that Atlas is giving favorable prices in this respect and if you care to follow that policy it would of course eliminate any question of infringement.

Mr. Hall responded to a question as follows:

> Q. With respect to the letters you have sent out, how many of these companies you contacted have become licensees?
>
> A. Atlas has become a licensee and Sears Roe-

> buck and Company purchases all their materials from Atlas and, therefore, in effect they are licensed. (Dep. of William D. Hall, p. 34).

Respondent argues that the antitrust laws are not violated because respondent and its assignor do not sell top fabrics. That was fully answered in *Mercoid*. The patentee Mid-Continent Investment Co. was a patent holding company which did not sell the unpatented furnace thermostats, yet it violated the antitrust laws and was subjected to a counterclaim for treble damages.

An important purpose of the antitrust laws is to promote free competition so that the public obtains quality products at the lowest price. When respondent's assignor exacts a royalty from the sale of each unpatented replacement fabric, the cost of each fabric to the public is correspondingly increased to defeat this important purpose of the antitrust laws. The patent laws carve out an exception to the antitrust laws consistent with the constitutional purpose of promoting the progress of the useful arts by granting a patent monopoly limited to the scope of the patent claims covering the invention for the term of the patent grant. But we don't see how this constitutional purpose is advanced by allowing the Mackie-Duluk patentees to levy this toll on the public for the privilege of purchasing an unpatented part of the patented discovery.

Respondent claims that its assignor's agreement licensing unpatented top fabrics in return for specified royalties are legal under the holding in *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950) (Resp. Br. 68-69, 79). But the holding in that case has no application here. Hazeltine licensed Automatic Radio under hundreds of patents and patent applications to manufacture and sell radios incorporating one or more patented electronic circuits. A particular model of radio might include one or

two patented circuits. Since each radio is sold as a complete unit for a set price, it is difficult to apportion this set price to patented and unpatented circuits. Instead of basing the royalty on the fraction of the radio selling price apportionable to patented circuits, the licensor and licensee, presumably for their mutual convenience, decided to base the royalty on the total sales of the licensee. But the licensor granted licenses to make and sell patented circuits. Respondent's assignor grants licenses to sell unpatented replacement top fabrics. And respondent asks this Court to enjoin petitioners from selling these fabrics.

In *Automatic Radio* the Court said:

> That which is condemned as against public policy by the "Tie-in" cases in the extension of the monopoly of the patent to create another monopoly or restraint of competition — a restraint not countenanced by the patent grant. See, e.g. Mercoid . . . 339 U.S. at 832.

And in his dissenting opinion Mr. Justice Douglas stated the well-established rule designed to curb the use of patents, predicting the acts of respondent and its assignor. He said:

> One who holds a patent on article A may not license the use of the patent on condition that B, an unpatented article be bought. Such a contract or agreement would be an extension of the grant of the patent contrary to a long line of decisions. . . . For it would sweep under the patent an article that is unpatented or unpatentable. Each patent owner would become his own patent office and by reason of the leverage of the patent, obtain a larger monopoly of the market than the Constitution or statutes permit. 339 U.S. at 837-38.

We ask this Court to hold that respondent and its assignor, who hold the Mackie-Duluk patent on a CONVERTIBLE FOLDING TOP WITH AUTOMATIC SEAL AT REAR QUARTER, may not license the continued use of the patented combination on condition that the replacement fabric, an unpatented article, be bought from Ford, General Motors, Atlas or some other replacement fabric seller who pays royalties to respondent's assignor.

While respondent questions the existence of express provisions in the agreements licensing replacement fabrics (Resp. Br. 80), it does not and cannot question that the effect of these agreements, especially when coupled with its suit to enjoin petitioners from selling replacement fabrics, is precisely an attempt to condition continued use of the patented combination on purchasing unpatented replacement fabrics from Ford, General Motors, Atlas or someone else who pays royalties to respondent's assignor. See *Leitch Mfg. Co.* v. *Barber Co.*, 302 U.S. 458, 463 (1938).

Respondent does not question that purchasers of convertible automobiles with the patented combination as original equipment use this combination with the authority of its assignor by virtue of the license retained by General Motors (R. 241, 509) and the release granted to Ford, so long as they use the original fabrics (R. 241, 510-11; Pet. Br. 48-49). These users are therefore not infringers under section 271(a) (Pet. Br. 76). Respondent and its assignor claim a right to revoke that authority and treat these automobile owners as infringers when the original top fabric and each replacement fabric is replaced. The authority to use is restored if the top fabric is purchased from someone who pays respondent's assignor a royalty. Respondent and its assignor certainly seem to be claiming the right to authorize continued use of the patented combination on the condition that each unpatented replacement fabric be bought from a source which it designates.

Respondent states that it and its assignor do not expect royalties from the sale of replacement fabrics which are installed with the rear quarter snap-fastened to the outside of the automobile body instead of permanently fastened to the rain trough inside the body as called for by the patent (Resp. Br. 70). But the automobile owner no longer has use of the patented combination, even though he can use the automobile without it. Thus, respondent is effectively claiming the right to force disuse of the patented combination when the worn fabric is replaced. But that right is not conferred by the patent grant. *Wilson* v. *Simpson*, 50 U.S. (9 How.) 109 (1850).

VI. Petitioners' Pleading Alleged Use of the Patent To Illegally Restrain Trade and Affirmatively Sought Relief.

Respondent states that there is no prior pleading directed to any alleged antitrust violation (Resp. Br. 72). Our answer included the following allegations:

> . . . [Respondent] was organized for the purpose of this suit and assigned the ownership of said Patent No. 2,569,724 for the Commonwealth of Massachusetts for the sole purpose of avoiding direct charges against the Automobile Body Research Corporation of misuse of said patent. Said Automobile Body Research Corporation has entered into at least one licensing agreement and/or has caused others to be sublicensed under agreements improperly extending the scope of the claimed subject matter of said patent and has thereby misused said patent and has improperly restrained commerce.
>
> . . . [By acquiring the Mackie-Duluk patent from Gen-

> eral Motors] Automobile Body Research Corporation has improperly extended its ownership of patents by this acquisition to monopolize and control the manufacture of automobile convertible tops. . . . (Defendant's Answer filed May 23, 1956, paras. 17 and 18; R. 1)

and requested the following affirmative relief:

> d. That this court find and enter a decree herein holding that said Patent No. 2,569,724 has been misused.
>
> g. That the defendants have judgment for costs and such other and further relief as equity may require or to this honorable court may seem meet and just. (Defendants' counterclaim filed May 23, 1956, para. 4; R. 1, 12).

It is true that there is no explicit request for treble damages for the violation of the antitrust laws by respondent and its assignor, but we believe that our pleading meets the requirements of FED. R. CIV. P. 8 of setting forth "a short and plain statement of the claim showing that the pleader is entitled to relief, and . . . a demand for judgment for the relief to which he deems himself entitled."

And FED. R. CIV. P. 54(c) specifically provides that

> . . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Petitioners do not claim that the extent of their damages have been proved. We merely ask for the right to introduce evidence on the extent of damages and the amount of counsel fees.

VII. Respondent Doesn't Deny That It Was Formed Solely For The Purpose Of Bringing This Suit.

Respondent objects to our reference to public court records and to a telephone directory which is in every home and office in Washington. But it does not deny the truth of the statements supported by these references (Resp. Br. 79). It is true that we subpoenaed and deposed individuals connected with Automobile Body with the aid of the Baltimore and Washington federal courts. However, if Automobile Body had brought this suit directly instead of forming the respondent suing corporation, we would have been able to obtain the relevant information through interrogatories and through depositions in Boston.

We think that this Court should state that the formation of a shell corporation to bring suit ought to always bar that corporation and the parties behind it from maintaining a suit in equity. This rule is especially important in the case at bar where federally granted monopoly rights involving the public interest are asserted.

Conclusion

The judgment of the court of appeals should be reversed with instructions set forth in our main brief conclusion (Pet. Br. 75).

Respectfully submitted,

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